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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-462

JESSE H. OSBORNE,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUPREME COURT OF THE UNITED STATES
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No.

JESSE H. OSBORNE,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner requests that a writ of certiorari be issued to review the decision of The United States Court of Claims in this case (Case numbered 145-74 and 247-74, as consolidated) which was entered on April 21, 1978.

OPINION BELOW

The opinion of the Court of Claims, comprised of the Opinion of the Trial Judge (App. A *infra*, 1a-35a as approved and modified by the order of the Court of Claims (App. B, 35a-37a) will be reported in ___ Ct. Cl. ___; ___ F. 2d ___ (1978).

JURISDICTION

The opinion of the United States Court of Claims was entered on April 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTION PRESENTED

Whether Jesse H. Osborne has a monetary claim against the United States for which relief may be granted under 28 U.S.C. §1491 and 10 U.S.C. §1201, *et seq.*, that is, was Osborne's original application to the Army Board for Correction of Military Records denied in an arbitrary, capricious and discriminatory manner so that upon evidence presented to the Court below a finding as such could have been made by the court below, resulting in enhanced payments for disability as a result of injuries received and medical conditions aggravated by service in the United States Army.

STATEMENT OF THE CASE

Petitioner initially filed an action against the Government in the United States District Court, Middle District of Florida, Tampa Division, which action was dismissed with leave to amend or to transfer.

Thereafter Petitioner filed his complaint in the United States Court of Claims seeking a determination of his entitlement to retirement pay from the date of his last release from active duty to the present and for the future based upon retirement for physical disability rather than for length of service. The Petitioner claimed arbitrary, capricious and discriminatory refusal of the Army Board for Correction of Military Records so as to reflect his disability retirement entitlement. The Government, in response, contended no such arbitrary, capricious nor discriminatory conduct by the said Army Board.

This cause was tried in Tampa, Florida, before the appointed Trial Judge of the Court of Claims on July 26, 1976. At trial, Petitioner offered in evidence the Army Records, MacDill Air Force Base records, and the testimony of private physicians, Veterans Administration physicians and lay witnesses to support his claim.

Government counsel was content to rely upon the records before the Board at the time of the Board's decision denying Petitioner correction of his military records so as to reflect his entitlement to retirement for physical disability rather than length of service only.

The trial judge entered his order denying relief on April 29, 1977, exception thereto was duly filed with supporting arguments of law.

Oral argument was had before three members of the court and thereafter its opinion was entered April 21, 1978.

STATEMENT OF THE FACTS

The Petitioner's name is JESSE H. OSBORNE. and he was born April 11, 1930, at Craig, West Virginia. He

enlisted in the United States Army on August 6, 1947, and served continuously until October 10, 1953. Thereafter he joined the Army Reserve on January 11, 1954, and returned to active duty therein on March 7, 1954, serving continuously thereafter until March 1, 1968, when he retired.

Subsequent to his retirement on March 1, 1968, the Veterans Administration gave the Petitioner a twenty percent (20%) disability based on ulcers and arthritis, said rating having been established approximately during the month of June, 1968.

During March or April 1969, the Petitioner received a letter from the Department of Army asking the Petitioner's consent for his return to active duty due to a critical shortage of Infantry operations and intelligence personnel, said military occupational specialty being one of those for which the Petitioner was peculiarly qualified. Thereafter the Petitioner made inquiry of the local Army Recruiter and advised the Recruiter that he was willing to consent to return to active duty. Application therefor was made through the Recruiter and physical examination was had at Jacksonville, Florida, at which time examining physicians and medical personnel were advised of the then existing disability rating and furnished documentation thereof. The recall specifically denominated that those recalled could have no disability rating, although Petitioner did have such a disability rating.

In February 1970, Petitioner received recall orders to report to Fort Jackson, South Carolina, which he

did; was subsequently sent to Fort Riley, Kansas, where he completed a thirty-day senior non-commissioned officers refresher course and thereafter reported to Fort Lewis, Washington, for embarkation from the air force base at Seattle, Washington, to the Republic of Viet Nam.

Notwithstanding the terms and conditions of recall restricting Petitioner's duty to operations and intelligence, Petitioner was forced to request transfer to a military occupational specialty as a First Sergeant in a Rifle Company engaged in combat duty, said assignment being made on May 19, 1970. During service in that position as described hereinabove, Petitioner while in the bush, suffered a stroke during the month of June 1970 and received other combat injuries, said injuries being more fully described in the official records.

During the entire period of time described herein, many formal requests were made for transfer to the proper military occupational specialty described in the recall request but not until the Petitioner wrote then Senator Edward Gurney was any transfer effected.

During or about October 1970, Petitioner wrote the then Senator Edward Gurney a letter describing in detail the matters and facts set forth herein and that as a result of that communication, Petitioner was sent back to Fort Lewis, Washington, on January 6, 1971, given a new suit of military clothes and mustered out with no physical examination of any type.

Thereafter on February 4, 1971, Petitioner requested of the Department of the Army a letter acknowledging the initial erroneous recall that sent him to Viet Nam so as to obtain reinstatement in his civilian employment. No reply was ever received. Thereafter, Petitioner requested of the Department of the Army an advisory of his status, active or retire, to which no reply was received. Thereafter, Petitioner wrote to Congressman Sam Gibbons advising that no retirement pay had been received, no final type physical examination had been given, that the previously determined disability rating had been arbitrarily removed and that no disability rating had been established subsequent to return to the Continental United States. The Congressman acknowledged receipt of letter and Petitioner's subsequent visit to his local office and he effected a resumption of retirement pay.

Thereafter and on or about February 1, 1972, Petitioner wrote to one General R. G. Fazakerlye, Commander of the United States Army Finance Center, inquiring as to status of retirement pay and a final type physical examination and was advised thereby that an increase in retirement pay was denied due to service less than three years and disability less than thirty percent.

On April 13, 1971, Petitioner went to Veterans Administration Out-Patient Clinic, Saint Petersburg, Florida, and during a fifteen minute consultation with a non-English speaking physician a cursory "physical examination" was administered. During February or March 1971, Plaintiff contacted one McCarthy connected with the Disabled American

Veterans Office in Saint Petersburg, Florida, who undertook to represent the Petitioner before the Army Board for Correction of Military Records, which requests were subsequently denied without hearing.

On or about May 2, 1972, a physical examination was conducted at MacDill Air Force Base, Florida. Thereafter a Staff Sergeant from MacDill telephoned Petitioner requesting that he pick up the original report of physical examination explaining that although repeated requests had been made to the Department of Army for direction as to delivery of said report, no reply had been received. After accepting said original report, Petitioner telephoned The Retirement Section of the Department of the Army on three different occasions for instructions as to dispositions of said report and he was advised to maintain said report until said section would call back with the instructions. To date, no instructions have been received.

That as of the date this action was commenced, Petitioner's military records reflect a twenty percent disability as of his retirement on March 1, 1968, and during the pendency of this proceeding a ten percent disability.

REASONS FOR GRANTING THE WRIT

I. The Trial Judge's conclusions, as approved by the Court, that the Board did not act arbitrarily and capriciously was contrary to the law and the manifest weight of the evidence.

At trial and before the Court of Claims counsel for the Petitioner attempted through evidence presented and arguments of law presented to show that Petitioner is entitled to monetary relief for failure upon the part of the Department of the Army to afford the opportunity for an accurate determination of Petitioner's physical disabilities — the absolute necessity for any determination for entitlement — and upon such failure by the Department, to permit any review for the purpose of correcting its errors.

The Government put on no live witnesses and relied only on documentary evidence, a transcript of what purported to be the complete and accurate medical history of the Petitioner while in the service of the United States which records were impeached by the testimony presented by and on behalf of the Petitioner.

The facts — uncontroverted by the government — as presented by the Petitioner are those narrated in the Statement of Facts herein along with the testimony and opinions of various experts.

The fact that the board did act arbitrarily and capriciously and without substantial evidence becomes evident when the following material undisputed facts which were adduced at trial are considered:

1. That Petitioner, JESSE H. OSBORNE, sustained physical injuries to his back, legs,

chest and arms when he was required to jump out of a helicopter approximately twelve (12) feet off the ground while on his last tour of combat duty in Vietnam.

2. That Petitioner sustained extreme physical fatigue while in the bush resulting in what was characterized as a stroke requiring intermittent medical treatment and other conditions likewise characterized as a possible bone-cyst, right femur and consequently was assigned a permanent L-3 profile with limitations of no standing nor marching.

3. That while Petitioner's squad was standing down for evacuation Petitioner was in continuous pain and at one time his knees had swollen to the point that they almost filled his fatigues as testified to at the trial by fellow soldier Bryant, as well as Petitioner.

4. That at the Army Board hearing, the Board considered the Veterans Administration and Air Force medical records in arriving at its decision in declining a correction of Petitioner's Army medical records.

5. That the Veterans Administration medical records which were considered by the Army Evaluation Board contained several unevaluated observations by doctors which characterized part of Petitioner's symptoms as an "emotional overlay".

6. That the said Veterans Administration medical records were later corrected (after the Army Board decision) by the Veterans Administration retroactive to 1973 so as to increase the 10% disability in Petitioner's feet to a 20% disability rating, thereby acknowledging its own oversight in its prior evaluation.

7. That private physicians testified at the trial that Petitioner had rheumatoid arthritis, superimposed over generalized osteoarthritis of a disabling nature which was service connected and further, that because of his physical condition he could not serve in the Army.

8. That a psychologist testified at the trial that Petitioner was suffering an emotional or psychological disability translating into a 72% loss of wage earning capacity making Petitioner unable to compete in the open job market although he was presently employed in a sedentary capacity only through the benevolence of his employer.

9. That the Petitioner's fellow workers and acquaintances testified to his physical incapacity and continuing pain.

10. Finally that based upon the various records relied upon by the Army Board (Veterans Administration and prior Army records) Petitioner was in fact, 30% disabled; 10% on account of the arthritic condition of the knees; 20% of the feet, such disability being service connected.

Upon the undisputed foregoing facts which were never presented or considered by the Board due to its failure to grant hearing, it is difficult to envision how the Board's decision could be characterized as anything but arbitrary and capricious and not based upon substantial evidence. The Court of Claims and this Court have repeatedly held that where the Board acting for the Secretary has acted arbitrarily, capriciously and without support of substantial evidence, the Court has the obligation to entertain a claim for disability retirement pay. *Beckham* v. *United States*, 183 Ct. Cl. 628 (1968), 392 F. 2d 619; *Ward* v. *United States*, 178 Ct. Cl. 210 (1967); *Furlong* v. *United States*, 153 Ct. Cl. 557 (1961) and *Unterberg* v. *United States*, 412 F. 2d 1341 (1969).

> There is no satisfactory indication that [the Board's findings] were based upon a balanced consideration of all the evidence available and presented. Where the medical issue is complex and in considerable dispute and the VA has previously found service connection, a disposition of the claim for disability retirement by the correction board without a hearing and without an analysis of the evidence in writing is inadequate assurance that due weight was given to all the evidence, both medical and non-medical, even though the opinion may formally recite that it was based on evidence. *Smith* v. *United States*, 168 Ct. Cl. 545 (1964).

In *Hutter* v. *United States*, 345 F. 2d 828 (1965) the Court of Claims held that where Government in-

troduced no witnesses to controvert the Petitioner's testimony and in fact no way refuted Petitioner's testimony the Court felt compelled to accept the Petitioner's evidence, at 832.

The Court in *Smith*, also considered that the physical examination given to the Plaintiff therein was "inadequate". The physical examination in this case rather than being inadequate is non-existent as Petitioner was repeatedly refused a final type physical examination as required by Army regulation then in effect until request by his Congressman produced such action from the Army some eighteen (18) months after his discharge.

The finding by the trial judge that the Army board did not act capriciously and arbitrarily is thus plainly erroneous as there was no evidence presented by Plaintiff at all to the Army board due to the purported "waiver" by the act of the Disabled American Veterans representative. The evidence presented at trial would at least thus compel a conclusion that the Board acted on insufficient evidence. The purported "waiver" by Petitioner will be discussed, *infra*.

II. That the Trial Judge's conclusions, as approved by the Court, ignored the clear violations of applicable laws and regulation by the Department of the Army.

At trial the following undisputed pertinent facts were adduced as follows:

1. That the Petitioner was returned to retired status without the final physical examination.

2. That the Petitioner and others repeatedly attempted to obtain a Board evaluation as mandatorily required by Army regulation.

3. That after the Army realized its failure to give Petitioner JESSE H. OSBORNE the final physical examination when same was brought to the Army's attention by Osborne's Congressman, it authorized such a physical some eighteen (18) months after release which occurred at MacDill Air Force Base, Florida.

Despite the existence of the undisputed foregoing facts recited above and the specific findings of fact by the trial judge that no final type physical examination was conducted prior to Petitioner's release from active duty and that one was finally given pursuant to congressional solicitation, the trial judge makes the curious observation that Petitioner purposefully delayed insisting on a final type physical examination and disability determination immediately after the effective date of retirement.

It is difficult to conceive how an untimely administration of the final type physical examination to Petitioner was in any way volitional on the Petitioner's part when the record is replete with evidence that such physical examination was accomplished only at the urging of Petitioner's Congressman and than at a time some eighteen (18) months after Petitioner's release from active duty. In fact, as noted previously, the trial judge himself found that the final physical examination was conducted at the instance of congressional intervention.

Assuming arguendo, and despite the record that the Army simply waited eighteen (18) months to administer Petitioner's physical and did so at its own instance, this fact alone would nevertheless require reversal of the Board's decision. The Court below has repeatedly held and it may be taken as unquestioned law that the Court of Claims will not interfere with the Service Secretary's determination of entitlement to military disability retirement with pay in the absence of arbitrary action *or where there has been some violation of applicable law or regulation. Ward* v. *United States,* supra; *Beckham* v. *United States,* supra; *Stephens* v. *United States,* 174 Ct. Cl. 365 (1966); *Unterberg* v. *United States,* supra; *Williams* v. *United States,* 186 Ct. Cl. 611 (1969) 405 F. 2d 890, cert. denied, 396 U.S. 966, 90 S. Ct. 447, rehearing denied, 396 U.S. 1047, 90 S. Ct. 692.

That a specific, applicable Army regulation has been violated here and thus falls under the rule of the foregoing cases becomes apparent when one examines the regulation governing final type physical examinations which was in effect at the time of Petitioner's discharge. *Army Regulation 40-501 Change 15, Section 10-25* entitled SEPARATION INCLUDING RETIREMENT reads in pertinent part as follows:

> The following schedule of separation medical examinations is established
>
> (2) Individuals on active duty, or active duty for training in excess of 6 months will be examined not earlier than 6 months *nor later than 2 1/2 months prior to the scheduled date*

> *of termination of active duty status* (Emphasis Supplied)

The final type physical examination as required by the above regulation which was finally given on May 2, 1972 was thus approximately 20 1/2 months late and thus a clear violation of the regulation. The trial judge attempts to avoid this fact, however, by his conclusion that the failure of the Army to give Petitioner the examination within the required time did not prejudice Petitioner's rights since Petitioner's physical condition allegedly worsened in the interim between his last retirement and the date of the final type physical at MacDill Air Force Base. This is nowhere supported by the evidence and must of necessity be sheer conjecture as to what Petitioner's condition would have been had he been given his final examination at the time of discharge.

The very reason for such a regulation would seem to be so that there would be no conjecture at all but rather the soldier's true physical condition would be known *at the time* of his separation or discharge. Indeed, in the case of *Towell* v. *United States,* 150 Ct. Cl. 422 (1960) the court considered whether *AR 40-105* which at that time was the Army Regulation providing for physical examination prior to separation, had been violated. In finding that that regulation, among others had not been violated, the Court by way of dicta in upholding the Board, indicated that if the regulation had been violated a different result would obtain:

> In conclusion we find that the decision of the Army Board for the Correction of Military

> Records was supported by the evidence *and there was compliance with pertinent Army regulations.* (Emphasis Supplied) Id. 437

Thus the blame for the non-compliance of the Army regulation can in no way nor should it be laid at the feet of the Petitioner as the trial judge opines, but rather should properly lie with the Army, who bears the ultimate responsibility for enforcing its own regulations.

Indeed, there is more than ample authority to hold the Government and its agents estopped from profiting from its own wrongful conduct. See *Vason* v. *United States*, 369 F. Supp. 1206 (1973); *Simmons* v. *United States*, 308 F. 2d 938, 945 (5th Cir. 1962); *Fox* v. *Morton*, 505 F. 2d 254, (9th Cir. 1974). The main thrust of such cases appears to be founded on equitable principles as seen by the language of the court in *United States* v. *Lazy F.C. Ranch*, 324 F. Supp. 698 (D.C. Idaho, 1971) as follows:

> In short, the state of the law in this circuit now appears to be that in the absence of some particular sovereign objective necessary to orderly government, *and where morals and justice require*, the government may be estopped by the acts of its employees. (Emphasis Supplied)

In fact, this is as classic an estoppel as may exist and the government should be required to recognize its existence.

> The resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little . . . The principle is that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong, . . . *It has been said that the government should always be a gentleman.* . . . We regard as unconscionable the Commissioner's claim of authority to assess a tax return for 1938 when the Commissioner himself was responsible for that failure. (Emphasis Supplied) *Stockstrom* v. *Commissioner*, 88 S.W. App. D.C. 286, 190 F. 2d 283 at pp. 288-289.

Accord: *Simmons* v. *United States*, supra.

Thus applying the foregoing principals to the case at bar it is readily apparent that estoppel should apply against the Army. A serious injustice would indeed occur were the Army allowed to profit from its own mistake inaction.

III. That the Petitioner was deprived of procedural due process, not only before the Court of Claims but also in the administrative process.

The trial judge in his opinion as approved by the Court of Claims states that the Petitioner, JESSE H. OSBORNE, has not established any procedural defect in the manner in which the Army Board for Correction of Military Records received, considered and decided this cause. It is first pointed out by the trial judge that

Petitioner was deprived of a hearing and an opportunity to appear in person before the Army Board for Correction of Military Records because he through his chosen counsel waived the oral hearing.

The Petitioner in fact, however, never waived his right to an evidentiary hearing before the Board, but said hearing waiver was a product of the unconsented, unilateral act of the Disabled American Veterans representative. Petitioner in fact testified at trial that the Disabled American Veterans representative gave him the impression that he would testify before the Army Board for Correction of Military Records and further testified that the form waiving the hearing had never been presented to him before. He further understood that he would be sent up to Washington to testify before the Board in addition to submitting his own evidence. This testimony is totally unrefuted, uncontroverted and uncontested in the record.

This conclusion is additionally supported by Respondent's Exhibit #1 presented at trial wherein one Albert Levine from the Disabled American Veterans requested that the case be submitted on the evidence of the record.[1] Nowhere on this form is there an acknowledgement or consent of such waiver purporting to be from Petitioner. Thus, this being the only evidence before the Court, it is difficult to conceive how the trial judge came to the conclusion that

1 An inspection of the roster of those admitted to practice before the Supreme Court of Florida, and hence lawfully authorized to act as attorney and counsel for claimants, reveals that no one named Albert Levine is so admitted. No power of attorney from Osborne to Levine has ever been produced by the Government. *Query* Levine's authority to "represent", much less "waive".

Petitioner's waiver was knowing and voluntarily in the face of such evidence. Again, *Hutter* v. *United States*, supra, is apposite in that this Court held that where Government introduced no witnesses to controvert the Petitioner's testimony and in fact no way refuted Petitioner's testimony the Court felt compelled to accept the Petitioner's evidence.

The trial judge next states that Petitioner failed to establish that any new or additional material evidence could have been presented even if he or his "counsel" had been afforded an opportunity to appear before the Army Board for Correction of Military Records in person. The opinion further states had Petitioner been allowed to testify he would have only focused attention on the Army's failure to give him a physical examination in a timely fashion. As previously discussed, this evidence in itself is quite material as it relegates the status of Petitioner's physical condition to one of mere conjecture absent the presentation of evidence.

The trial judge next states that refusal of an opportunity to appear in person was the only reasonable course for the Board to take, that anything Petitioner could have added would have been "self-serving" and therefore entitled to little if any weight and further that "an opportunity for oral argument is not always a prerequisite to a fair determination, especially in a situation like the one at bar". The above cited statements by the trial judge at the very least do violence to the time honored concept of due process as contained and developed in the Anglo-American system of jurisprudence. To conclude that an oppor-

tunity to be heard could simply be dismissed as "self-serving" and therefore entitled to "little if any weight" is a novel proposition indeed. While it is recognized that there may be valid reasons for refusal to grant a hearing, to do so on the basis that one's own statements are unreliable with no other reason than because such statements are his own testimony, certainly seems to fly in the face of every established principal of American Jurisprudence.

The last statement by the trial judge with regard to Petitioner's procedural rights wherein he states "an opportunity for oral argument is not always a prerequisite to a fair determination especially in a situation like the one at bar", seems especially anomolous after the trial judge had heard testimony from nine witnesses of the Petitioner with the majority of that number being expert witnesses. Once again, *Smith* v. *United States*, supra, is apposite. The Court there stated as follows:

> First, there is no satisfactory indication that they were based upon a balanced consideration of all the evidence available and presented. When a medical issue is complex and in considerable dispute, and the VA has previously found service connection, a disposition of the claim for disability retirement by the correction board *without a hearing and without an analysis of the evidence in writing* is inadequate assurance due weight was given to all the evidence, both medical and non-medical, even though the opinion may formally recite that it was based on all the evidence. At 553. (Emphasis Supplied)

Not only was Petitioner denied a hearing by the Board, but such hearing was simply summarily denied with no analysis or discussion of the evidence presented in writing. The Court has repeatedly held that such a summary denial by the Board is insufficient. The Court in *Craft* v. *United States*, 544 F. 2d 468 (1976) expressed this by the following:

> Moreover we have in the past held that in order to accord the requisite finality to administrative decisions in the military retirement area, boards must discuss in writing, the reasons for their actions.

The Court in *Beckham*, supra held:

> A *naked conclusion* and mere recitation that the opinion is based upon all the evidence without an analysis of the evidence in writing *. . . is inimical to a rational system of administrative determination and ultimately inadequate.* (Emphasis Supplied) at 474. *Accord: Versaci* v. *United States*, 403 F. 2d 246, 185 Ct. Cl. 672 (1968) at 691.

The trial judge's reference to Petitioner's opportunity for oral argument as not always a prerequisite to a fair determination, is perhaps overshadowed by the language of this Court with regard to the nature of retirement board hearings. "The oral examination of the officer is granted for the purpose of making full discovery of all facts as to his condition. These hearings are not contests; *they are inquiries concerning disability. The purpose is to get at the truth of the matter.*"

Robertson v. *Chambers*, 341 U.S. 37, 38-40 (1951) (Emphasis Supplied).

The conclusion by the trial judge that none of Petitioner's procedural rights were adversely affected is not supported by the evidence nor the applicable law and such a conclusion is thus error.

CONCLUSION

The Court of Claims has denied the claim of Petitioner in the face of unrefuted, uncontroverted evidence. Substantial injustice in the form of deprivation of procedural due process and denial of substantial relief has occurred.

This court should issue its Writ of Certiorari to review the findings and conclusions of the Court of Claims so as to provide the relief to which the Petitioner is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DAVID LUTHER WOODWARD, one of the attorneys for JESSE H. OSBORNE, Petitioner and a member of the Bar of the Supreme Court of the United States hereby certify that, on the ____ day of September, 1978, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States by mailing three copies thereof to the Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, in a duly addressed envelope with proper prepaid postage affixed thereto; and

2. To the Honorable LeRoy Southmayd, Attorney, United States Department of Justice, by mailing a copy thereof in a duly addressed envelope with proper prepaid postage affixed thereto.

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

Nos. 145-74 and 247-74

(Filed APR. 29, 1977)

JESSE H. OSBORNE

versus

THE UNITED STATES

David Luther Woodward, attorney of record, for plaintiff. *Britt Whitaker*, of counsel.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

OPINION*

BROWNE, *Trial Judge:* Plaintiff,[1] Jesse H. Osborne, is a twice-retired enlisted member of the Armed Forces of the United States. He is seeking a determination of entitlement to retirement pay from the date of

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* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

1 The petitions were originally filed by Jesse H. Osborne and Margaret Osborne, his wife, as co-plaintiffs. The petitions were withdrawn during trial as to Margaret Osborne. Accordingly, the petitions stand dismissed as to her. Therefore, the opinion refers only to Jesse Osborne as plaintiff.

his latest release from active duty to the present, based on retirement for physical disability rather than for length of service.

Plaintiff was retired for the first time on March 1, 1968, having completed 20 years of service in the Army. Shortly after retirement, Osborne applied to and received from the Veterans Administration (VA) a physical disability rating of 10 percent. He pressed for further consideration, and his disability rating was increased to 20 percent by the VA.

Exactly 2 years after his first retirement, Osborne voluntarily returned to active duty. During his second tour of duty, he received full active duty pay. Accordingly, the original disability rating from the VA was not effective during that period. After serving for a period of 10 months and 6 days on this tour of duty, he was returned to retired status, again on the basis of length of service.

After his second retirement, Osborne again applied for and ultimately received a disability rating of 20 percent from the VA.

Plaintiff contends that, upon his release from active duty the second time, he was entitled to have been retired by the Army for disability rather than for length of service. He maintains that, at the time of his last discharge, he was unfit for retention or recall to duty by reason of physical disability and that he should have been retired by the Army for physical disability with a rating of at least 30 percent.

Based on the VA records and those of the Army, Osborne sought from the Army Board for Correction of Military Records (ABCMR) a determination that his records should be corrected to reflect retirement by the Army for physical disability ratable at a minimum of 30 percent. His application was denied.

He invokes the jurisdiction of this court to overturn the determination of the ABCMR. It is the court's view that it does not have jurisdiction in this case.[2] If, however, jurisdiction exists, petitioner has failed to establish, by the necessary degree of proof, that he is entitled to any relief which this court has authority to grant. Accordingly, the petition must be dismissed.

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2 There is a substantial problem as to the jurisdictional basis for this suit. Plaintiff asserts jurisdiction under 10 U.S.C. § 1201 *et seq.* That section authorizes the Secretary to retire members of the armed services for disability if certain conditions are met. That section and those following do not purport to confer jurisdiction upon this or any other court to make that determination. Some other, independent, jurisdictional basis must be found.

Assuming, momentarily, that plaintiff's Army retirement pay is offset dollar-for-dollar, by amounts received from the VA on the basis of disability, no possible jurisdiction is envisioned. The claim may not be treated as a tax refund action, for even though 26 U.S.C. § 104(a)(4) (1970) permits exclusion from gross income of disability payments, plaintiff has not made the necessary allegation of denial of a timely petition for refund (26 U.S.C. § 7422(a) (1970)). Relief of a declaratory nature is also unavailable in this court. *United States* v. *King*, 395 U.S. 1 (1969).

Thus, the question is squarely posed: irrespective of the tax consequences, does plaintiff have a monetary claim against the United States for which relief may be granted under 28 U.S.C. § 1491 (1970)? Plaintiff has not shown that he has such a claim.

A reading of 10 U.S.C. § 1402 (1970), especially subsection (d), suggests plaintiff *may* be able to collect more total money if his disability claim is allowed by the Army. However, without specific salary figures to consider, we cannot determine whether there is a potential monetary consequence such as is needed to create a claim.

I. *Statement of the Case*

Osborne enlisted in the United States Army on January 25, 1948. He served honorably, married, raised a family, and applied for retirement for length of service as he approached eligibility on the basis of 20 years of satisfactory service.

Osborne was stationed in the Canal Zone (Panama) just prior to retirement, his family having been settled in Florida during that tour of duty in anticipation of his retirement. He was transferred from the Canal Zone to Fort Gordon, Georgia, for retirement processing. There he was given a final-type physical examination on August 4, 1967, 5 months prior to the effective date of his retirement. Non-disabling physical complaints were noted at that time, including duodenal ulcer, astigmatism, hypertrophy of prostate (benign), and tinea pedes (athlete's foot). His "physical profile" was revised to reflect his ulcer and his defective vision. There was no record of any evidence of an arthritic condition at that time.

It was recommended in the medical report that Osborne should not be assigned to any unit requiring continued consumption of combat rations or to any isolated unit lacking facilities for definitive medical care. No assignment limitations were otherwise imposed; no disability rating was determined; and there was no indication that Osborne was ineligible for recall to active duty.

Osborne's retirement became effective March 1, 1968.

In February 1968, a few days before his Army retirement became effective, Osborne petitioned the VA for disability benefits and was given a 10 percent rating for his ulcer condition. Subsequently, at Osborne's insistence that he was suffering from acute arthritis, the rating was increased to include an additional 10 percent for the arthritic condition.

About a year after retirement, Osborne received an Army circular inviting eligible retirees having military occupation specialties such as his to apply for recall to active duty for service outside the United States. Notwithstanding his VA disability rating, Osborne applied for recall to active duty. His application was accepted, and he was ordered to report to Jacksonville, Florida, for a physical examination on April 3, 1969, and for assignment to duty.[3]

Osborne reported to Jacksonville pursuant to the orders and was given a physical examination. He was accepted and sent to Vietnam. There he was assigned to a field unit.

While on duty with the field unit in Vietnam, Osborne complained of such ailments as headaches, stomach cramps, and a fungal infection of his feet. He also claimed to have suffered a "stroke" when he jumped from a helicopter to the ground, with full field pack, during a field mission.

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3 Plaintiff would like to make an issue of the Army's error in readmitting him, since his VA disability rating apparently made him ineligible for recall. But since his second period of military service led to no permanent disability warranting retirement, this issue is not addressed.

Shortly after that unfortunate mission, he was assigned to a more sedentary job at headquarters in An Khe, Vietnam. While there, he met Charles Bryant. Bryant testified at the trial as to Osborne's apparent condition at that time as compared with the present.

While serving in the headquarters command, Osborne requested that he be returned to the United States for retirement processing and retirement. He was released from active duty in January 1971 at Fort Lewis, Washington, without having been given a "final-type" physical examination.

Shortly after his second retirement, upon return to his home in Florida, Osborne sought a final-type physical examination from the Army. After seeking the aid of his Congressman and one of his Senators, he obtained such an examination at MacDill Air Force Base, Tampa, Florida, the nearest Armed Forces facility capable of conducting such an examination on behalf of the Army. The final-type physical examination conducted at MacDill Air Force Base did not include any evidence which would establish that plaintiff should have been retired for physical disability.

In the meantime, Osborne also underwent various VA examinations in an effort to obtain a VA disability rating for his claimed arthritic condition. Ultimately, VA granted a 10 percent rating for the arthritic condition, but no rating for his ulcer condition was awarded at that time. The neurological examination by the VA doctors revealed no evidence to substantiate plaintiff's claim of a "stroke" or other cerebrovascular accident or condition, service-

connected or otherwise. (Plaintiff's disability rating for arthritis has since been increased to 20 percent, the determination letter stating that the rating disposed of all pending claims for VA disability ratings.)

Plaintiff turned next to the ABCMR,[4] asking the Board to "correct" his records to show Army retirement based on a 30 percent disability rating. Osborne's application to the ABCMR stated: "I was not given a retirement physical at the time of my separation. I feel that I should have been retired due to disability." The application requested an opportunity for plaintiff to appear before the Board in Washington, D.C., and named the Disabled American Veterans (DAV) as counsel.

The ABCMR requested and received from the VA all records pertaining to plaintiff. Included were all clinical and medical records and reports of physical examination held by both the Army and the VA. The DAV counsel reviewed the file and submitted the case to the ABCMR on behalf of Osborne "on the evidence of record."

The ABCMR requested and received from the authorized representative of the Surgeon General an advisory opinion which concluded that, on the basis of plaintiff's final-type physical examination and the VA examination, plaintiff was "fit for retention and retirement." The ABCMR also obtained an advisory opinion from one of its examiners, who reviewed the records of plaintiff's medical condition. The examiner,

4 The ABCMR was established by the Secretary of the Army under the authority of 10 U.S.C. § 1552 (1970), which permits the correction of military records where the Secretary "considers it necessary to correct an error or remove an injustice."

too, concluded that plaintiff was not unfit for military service at the time of retirement, and advised that there was insufficient evidence suggesting any error or injustice which would warrant a formal hearing.

The ABCMR denied Osborne's application without an oral hearing. The Adjutant General informed plaintiff that his application had been denied by the Board because insufficient evidence had been presented to indicate probable material error or prejudice. The letter added,

> In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Osborne and his wife did not attempt to submit "new and material evidence" to the Board, but instead, filed suit against the United States Government in the United States District Court for the Middle District of Florida in Tampa. That action, however, was transferred to the Court of Claims, following plaintiff's motion to transfer under 28 U.S.C. § 1406,[5] and was assigned Docket No. 247-74. Meanwhile, the Osbornes had also filed a separate action in the Court of Claims,

5 Plaintiff's memorandum in support of the motion to transfer indicated the transfer was sought because the district court was denied jurisdiction by 28 U.S.C. § 1346(d) (1970), which states that district courts shall not have jurisdiction of claims for pensions. Yet 28 U.S.C. § 1501 (1970) specifies, "[t]he Court of Claims shall not have jurisdiction of any claim for a pension." Clearly, jurisdiction does not lie if the claim is seen as one for a pension; jurisdiction cannot be established absent some independent jurisdictional basis. As indicated in note 2, *supra*, plaintiff has failed to establish that jurisdiction exists to hear this controversy.

which case was assigned Docket No. 145-74. The two cases involving common issues of law and fact, were consolidated and tried as one case in Tampa, Florida, on July 26-28, 1976.

During the trial, when it became apparent that Mrs. Osborne did not have a cause of action for which relief could be granted, the petitions were withdrawn and dismissed as to her.

II. *Discussion*

Plaintiff's complaint raises both procedural and substantive issues. Mr. Osborne contends the ABCMR procedures were defective because he was denied a personal hearing. Substantively, he complains that he was entitled to be retired by the Army for physical disability under the standards of 10 U.S.C. § 1201 (1970).[6]

6 "§1201. Regulars and members on active duty for more than 30 days: retirement.

"Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title) for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also determines that —

"(1) based upon accepted medical principles, the disability is of a permanent nature;

"(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

"(3) either —

"(A) the member has at least 20 years of service computed under section 1208 of this title; or

"(B) the disability is at least 30 percent under

This statute clearly entrusts to the Secretary of the service (and, by implication, the Secretary's delegate) the responsibility for determining who is fit to perform the duties of his office, grade, rank, or rating. Determination of such fitness is not the responsibility of the courts. *Towell* v. *United States*, 150 Ct. Cl. 422, 433-34 (1960); *Wales* v. *United States*, 132 Ct. Cl. 765, 769-71, 130 F. Supp. 900, 903 (1955). It is well settled that this court will not interfere with such determinations unless the plaintiff can show the actions of the Secretary or the Board to have been arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to applicable law and regulations. *Id.* Such a showing must be by "clear and convincing evidence"; plaintiff bears a heavy burden in trying to overcome the presumption of correctness of official acts. *Armstrong* v. *United States*, 205 Ct. Cl. 754, 761, 762-63 (1974); *Cooper* v. *United States*, 203 Ct. Cl. 300, 304-05 (1974).

A careful review of all the available evidence establishes beyond a shadow of doubt that plaintiff has not provided anywhere near the quantum of proof necessary to carry his burden.

Section 1201 permits retirement for disability only where the member of the armed services involved:

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the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination; and either —

"(i) the member has at least eight years of service computed under section 1208 of this title;

"(ii) the disability is the proximate result of performing active duty; or

"(iii) the disability was incurred in line of duty in time of war or national emergency."

> * * * is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay * * *.

Plaintiff was repeatedly examined by Army and VA medical personnel, and at no time was he ever found unfit for retention in the service or for recall to active duty.

True, medical examinations did reveal that Osborne suffers from a number of physical ailments. At various times, he experiences difficulties with an arthritic condition, athlete's foot, and manifests symptoms of an ulcer. Yet this does not prove plaintiff's entitlement to Army disability retirement. An individual may have physical complaints which are annoying in the extreme, while still remaining qualified for military service. *Wales* v. *United States*, *supra*, 132 Ct. Cl. at 769-70, 130 F. Supp. at 903; *Callan* v. *United States*, 196 Ct. Cl. 392, 399-400, 450 F.2d 1121, 1125 (1972). Indeed, plaintiff presented no evidence showing he was unfit for retention or recall to military service at the time of either retirement. In fact, despite testimony by one of plaintiff's doctors that plaintiff's condition has worsened from 1973 to 1975, plaintiff is not now physically disabled to any substantial degree. He continues to hold a steady job, and each doctor who addressed the issue advised him to continue to work. Such is not the situation of one who should have been retired for permanent disability several years ago. He appeared and testified in open court at the trial of the present case and at no time did it visibly appear that he was incapacitated. He took the stand and stepped

down without assistance and entered and left the courtroom from time to time during the days of the trial without showing visible signs of incapacity.

Given the impossible task of showing plaintiff's permanent physical incapacity, however slight, plaintiff's counsel argues that disability retirement was, nevertheless, mandated by plaintiff's mental condition, labeled by one doctor as a "conversion reaction." While it appears accurate to say that plaintiff's emotional condition may cause him to exaggerate the seriousness of his physical complaints, this does not necessarily mean that plaintiff should have been retired for physical disability by the Army. The Board considered a medical report that plaintiff's symptoms seemed aggravated by an "emotional overlay" but did not believe the situation warranted "correction" of his military records. Nor do we. That one instinctively overestimates the seriousness of his ailments should hardly be reason for this court to order his retirement to be changed to one for physical disability.

Plaintiff's situation is substantially distinguishable from that found in *Hoppock* v. *United States*, 176 Ct. Cl. 1147 (1966), upon which plaintiff relies.[7] In *Hoppock*, extensive combat exposure caused the "complete collapse" of a bright and promising young officer.

7 Other citations in plaintiff's brief are flawed by being wholly inapposite, out of context, or erroneous summations of the holdings. Indeed, the facts, too, of the present case are at times distorted by plaintiff's counsel in an effort to make some of the citations applicable.

Defendant's brief, on the other hand, was less than helpful in that the numerous citations often missed the mark or failed to focus on the issue in the case, namely, the correctness of the action of the ABCMR in refusing to change plaintiff's records.

There, the VA had officially determined that plaintiff's neuropsychiatric condition was service-connected. *The diagnosis of anxiety reaction had been repeatedly confirmed by service doctors during plaintiff's military service.* Plaintiff consistently failed in every civilian occupation he undertook after release from active duty, and the permanent psychoneurotic condition prevented plaintiff from obtaining jobs equal to his training and his intelligence. Under such circumstances, the ABCMR's denial of a request to change plaintiff's retirement to one for disability was overturned.

Mr. Osborne's situation is quite different. The alleged conditions have not been confirmed by repeated diagnosis. Service connection is not established or conceded.[8] Indeed, plaintiff has been able to find and perform adequately a civilian job commensurate with his training and intelligence.

Finally, it is worth noting that plaintiff waited until well after his second voluntary retirement before first contending he was so incapacitated that he should have been retired by the Army for permanent disability. *See Callan* v. *United States*, *supra*, 196 Ct. Cl. at 397, 450 F.2d at 1124. It would seem that he would have in-

8 Upon Osborne's first retirement, he found civilian life disappointing and at variance with expectations. When he returned to military service, life in the "new Army" had changed so much that Osborne was uncomfortable with the younger officers, who, he discovered, were "playing poker and smoking pot." Obviously he was not delighted either with his assignment to Vietnam or his clashes with younger superiors. In a sense, he seemed to feel there was little place for him in productive society — undertrained for the civilian environment and responsibilities and unable to remain content in the restructured environment of the military service.

sisted on a final physical and a disability determination, if not in advance of his effective date of retirement, at least immediately thereafter.

In sum, plaintiff has failed to carry his substantial burden of showing the decision of the ABCMR was *substantively* defective. Considering the VA and Army records received in evidence, the advisory opinions obtained by the ABCMR, the deposition and trial testimony of private and Government doctors, and the testimony of Osborne, his wife, and several acquaintances, we find the record as a whole fails to provide any reason why the ABCMR should have "corrected" plaintiff's record to show retirement by the Army for disability under the applicable law and regulations.

Osborne has not established any *procedural* defect in the manner in which the ABCMR received, considered, and decided his claim. His prime complaint is that he was denied an opportunity for an oral hearing and an opportunity to appear in person before the ABCMR. This argument is deficient in three material respects. First, plaintiff was represented before the Board by counsel of his own choice. His chosen counsel, acting on Osborne's behalf and with his authorization, waived an oral hearing. (Absent some showing that this decision itself was not valid, plaintiff cannot have another "bite at the apple" by contesting his agent's authority to act on his behalf.)

Second, plaintiff failed to establish that any new or additional material evidence could have been presented even if he or his counsel had been afforded an opportunity to appear before the ABCMR in person.

When asked at trial what he would have told the Board if he had appeared in person, plaintiff said only that he would have focused attention on the failure of the Army to give him his final-type physical examination at the time of his separation. Such failure cannot, in any event, be said to have prejudiced his rights, since his own evidence indicates his physical condition worsened in the interim between his last retirement and the date of the final-type physical at MacDill Air Force Base. Thus, an earlier examination would have been even *less* likely to provide sufficient evidence to establish plaintiff's physical incapacity for retention in military service at the time of his retirement.

Third, the denial of an opportunity to appear in person was the only reasonable course for the Board to take, given the medical records forwarded by the VA and the Army and the advisory opinions provided by the Surgeon General and the Board's own examiner. Anything Osborne could have added would, at best, have been self-serving and therefore entitled to little, if any, weight. Hearings are granted by the Board only in a limited class of cases, and there is no denial of due process in the Board's refusal to grant a hearing where the individual makes no showing of probable error or injustice. *See Newman* v. *United States*, 185 Ct. Cl. 269, 276 (1968). An opportunity for oral argument is not always a prerequisite to a fair determination, especially in a situation like the one at bar. Here, the Board not only complied with all applicable statutes and regulations, but also left the door open for Osborne to supplement his claim with additional evidence, saying that further proceedings were not contemplated "[i]n the absence of new and material

evidence tending to show existence of error or injustice in the military records * * *."

Despite this opportunity, plaintiff never offered any additional evidence to the Board after receiving its decision. In view of plaintiff's failure of proof at trial here, the decision to forego further Board proceedings was, in retrospect, well justified.

No reason has been advanced by plaintiff which would lead to a conclusion that the Board's decision is not entitled to finality. Plaintiff has been accorded due process and has received a decision which is supported by law and substantial evidence and is neither arbitrary nor capricious.

Thus, even if plaintiff could surmount the jurisdictional hurdle, the petition would have to be dismissed on its merits, since plaintiff has failed to establish any claim against the United States for which this court may grant relief.

FINDINGS OF FACT

1. Jesse H. Osborne and his wife Margaret Osborne initially filed suit in the United States District Court, Middle District of Florida, Tampa Division, seeking damages from the United States resulting from Jesse H. Osborne having been recalled to active duty in the United States Army on March 1, 1970. By an order of the district court, dated December 4, 1973, the court granted defendant's motion to dismiss, with the plaintiffs given leave to amend their complaint within a period of 6 months in order that plaintiffs could exhaust their administrative remedies.

2. By motion filed April 24, 1974, Jesse H. Osborne and Margaret Osborne moved the district court to transfer the case to the United States Court of Claims, and, in a memorandum in support of motion to transfer, stated therein, in pertinent part, that:

> * * * The Complaint filed in this action invoked as jurisdiction that statute found at 28 U.S.C. § 1346(2)(b); however, further reading of that statute also provides, in part ". . . . (t)he District Courts shall not have jurisdiction under this Section of any Civil Action or claim for a pension."

3. By an order of the United States District Court, Middle District of Florida, Tampa Division, issued April 24, 1974, the case of *Jesse H. Osborne and Margaret Osborne, his wife* v. *Department of the Army and the United States of America*, No. 73-231-Civ.-T-K, was ordered transferred to the Court of Claims, with a copy of the record made in that court.

4. On April 24, 1974, plaintiffs Jesse H. Osborne and Margaret Osborne, his wife, filed a "Petition For Damages" in this court, Ct. Cl. No. 145-74. Defendant, on June 24, 1974, filed a motion to dismiss the petition in Ct. Cl. No. 145-74 on the ground that the claim sounded in tort. The district court record was subsequently transferred and filed with the Court of Claims on July 8, 1974, Ct. Cl. No. 247-74. Pursuant to plaintiffs' mopursuant to an order of this court dated August 16, 1974, "provided that defendant's pending motion to dismiss in No. 145-74 shall be considered as applying also to No. 247-74." By an order of this court, filed September 20, 1974, the court dismissed plaintiff's petitions because their claims sounded in tort over which this court had no jurisdiction.

5. By an order of this court dated January 10, 1975, plaintiffs' motion for a rehearing, pursuant to Rule 151, was granted; the September 20, 1974 order of dismissal was vacated and set aside; and plaintiffs were granted leave to file an amended petition. Plaintiffs' first amended petition was filed January 10, 1975, and defendant's answer thereto was filed February 14, 1975.

6. Defendant filed a motion for summary judgment on December 31, 1975, and plaintiffs filed a "countermotion" for summary judgment on February 3, 1976. Upon consideration of the briefs and oral argument of counsel, the court, by order filed May 7, 1976, denied the motions for summary judgment and remanded the cases to the trial judge for further appropriate proceedings.

7. During the trial of this case held in Tampa, Florida, July 26-28, 1976, Margaret Osborne, the wife of Jesse H. Osborne, withdrew as a party plaintiff in the consolidated cases, Ct. Cl. Nos. 145-74 and 247-74, and defendant consented to this withdrawal. Accordingly, the trial judge allowed the withdrawal and dismissed Margaret Osborne as a party plaintiff.

8. Plaintiff Jesse H. Osborne entered active duty in the Armed Forces on January 25, 1948, and served for a period of 20 years, 1 month, and 29 days. He was voluntarily retired under 10 U.S.C. § 3914 on March 1, 1968.

9. In anticipation of plaintiff's impending retirement, a physical examination was begun on June 30, 1967.

10. On August 4, 1967, a medical board at Fort Gordon, Georgia, found plaintiff fit for duty with only minimal assignment limitations and recommended permanent change of physical profile to include P-3 (due to duodenal ulcer) and E-2 (due to defective vision). The board recommended:

E. No assignment to units requiring continued consumption of combat rations.

F. No assignment to isolated areas where definitive medical care is not available (MAAG-Military Missions, etc.).

Q. No assignment limitations.

The board recommendations were approved on August 10, 1967.

11. Subsequent consultations were conducted with final medical board proceedings being concluded on January 25, 1968. The board concluded plaintiff was medically fit for further military service with the following medical conditions: ulcer of duodenum, astigmatism, hypertrophy of prostate-benign, and tinea pedes (commonly called "athletes foot").

12. The board action was approved on February 5, 1968, and plaintiff was notified of the board's decision on February 6, 1968. Plaintiff declined to appeal the decision.

13. On March 1, 1968, plaintiff's retirement date, he signed a statement indicating that there was no change in his medical condition since his last examination. Plaintiff was thus retired under the provisions of 10 U.S.C. § 3914.

14. On February 20, 1968, just 9 days prior to discharge, plaintiff applied for VA benefits (disability compensation), listing disabilities as the ulcer condition; requiring orthopedic shoes (considered as a claim for a foot disability); and tedius pedius (tinea pedes).

15. By rating action on March 25, 1968, based on his military service records, plaintiff was rated by VA service-connected for duodenal ulcer with a 10 percent disability evaluation from date of discharge, and service-connected for tinea pedes with a 0 percent evaluation. Rating as to the foot condition was deferred pending receipt of complete service records.

16. After VA received plaintiff's amendment to his claim to include hearing loss of both ears and dermatitis of hands (as well as the feet), plaintiff was afforded a physical examination by VA commencing on May 28, 1968.

17. The VA physical examination of May 28, 1968 included X-ray examination of chest, feet, gastrointestinal (G.I.) series, audiometry, and an overall general physical examination. On the basis of this examination and additional service medical records, a rating action on June 21, 1968 continued the 10 percent evaluation for the service-connected duodenal ulcer; granted service-connection for defective hearing and prostatic hypertrophy, with a noncompensable evaluation as to each; extended service-connection for the fungus infection, previously involving only the feet, to include the anal region and hands, but evaluated 0 percent disabling; and granted service-

connection with a 10 percent evaluation for arthritis. This warranted a 20 percent combined disability rating, and would have accordingly qualified plaintiff for VA disability compensation payments if plaintiff had elected to waive an equal amount of Army retired pay.

18. Plaintiff submitted an application to the Army on April 3, 1969 for recall from retired status, under the provisions of AR 601-250, dated February 18, 1969, then in effect.

19. In connection with plaintiff's application for recall, he was given a physical examination on April 3, 1969 in accordance with paragraph 4, AR 601-250. Plaintiff was found qualified for recall.

20. An interview for recall was conducted at the U.S. Army Recruiting Main Station, Jacksonville, Florida, resulting in a recommendation of recall in the grade and military occupational specialty requested. Eligibility requirements for recall are set forth in paragraph 3, AR 601-250, which states, in part, that retired enlisted personnel may apply for recall to active duty for a period of 3 years, provided that they "are not eligible for or receiving disability retirement pay."

21. Orders were issued on February 6, 1970, directing plaintiff's recall to active duty effective March 1, 1970. He was subsequently assigned to duty in the Republic of Vietnam.

22. Plaintiff's medical records reflect that he received an eye examination and treatment for an upper respiratory infection and impacted cerumen of the ears in March and April 1970 prior to his departure for Vietnam. Plaintiff continued treatment of the ear condition at the 67th Evacuation Hospital in Vietnam also in April 1970. On June 4, 1970, plaintiff was seen at an aid station in Vietnam with a complaint of sharp anterior chest pains. There was no radiation, but some shortness of breath was reported. The findings in the physical examination were essentially normal.

23. On July 16, 1970, plaintiff reported to the aid station that he had awakened the previous day with extreme dizziness, headache, and stomach cramps which diminished during the day. When reporting, plaintiff still complained of slight lightheadedness. He was also treated for the dermatological condition of both forearms and the right heel.

24. On July 18, 1970, plaintiff complained of pain in the shoulder and knees which was considered as possibly due to arthritis. He was referred to orthopedics. The next day, as the records show, plaintiff was under treatment for bursitis. Limited duty was recommended. The report of X-ray examination of the knees and left shoulder indicated negative findings so far as arthritis was concerned. Plaintiff continued to receive treatment for the dermatology and infected heel.

25. On July 23, 1970, the bursitis of plaintiff's left shoulder was reported improved but still exhibited some pain. A request was recorded for an orthopedic

evaluation for possible change of military occupational specialty to preclude field duty. It was indicated that after 2 months in the field, plaintiff was unable to keep up with his company. The report of orthopedic consultation indicated an "impression" of a bone cyst of the distal portion of the right femur. Meanwhile continued treatment of the infected right heel was reported.

26. On September 29, 1970, a medical board recommended a permanent profile of L-3 with no prolonged standing or marching, and no field duty. The date of approval of the findings and recommendations is not shown.

27. Under date of October 26, 1970, plaintiff requested release from active duty and return to retired status. Plaintiff stated that he did not meet the eligibility requirement for recall and thus should be released from active duty. This request was forwarded through channels, and a final approval of the request was made on December 14, 1970.

28. Plaintiff was returned to the Continental United States (CONUS) and relieved from active duty, with a reversion to retired status, effective January 7, 1971. No final-type physical examination was conducted prior to plaintiff's release from active duty.

29. As a result of his solicitation of congressional intervention, plaintiff was informed on February 15, 1972 that he could go to the nearest military facility, *i.e.*, MacDill Air Force Base, Tampa, Florida, for a physical examination. A final-type physical ex-

amination was subsequently conducted at plaintiff's request at MacDill Air Force Base on May 2, 1972.

30. Plaintiff, during September 1972, applied to the ABCMR seeking a change in his records to reflect disability retirement in lieu of retirement for length of service. The ABCMR reviewed his application and denied his request. The Board concluded that insufficient evidence had been presented to indicate that probable material error or injustice had occurred, and plaintiff was so notified by the Adjutant General by letter dated February 27, 1973.

31. Subsequent to plaintiff's release from active duty, with a reversion to retired status, effective January 7, 1971, plaintiff was examined and rated by the VA on several occasions.

32. Plaintiff was medically examined by the VA commencing on April 13, 1971. The VA reports showed that the electrocardiogram tracings were normal; that examination of the hearing mechanism revealed very mild bilateral hearing loss due to sensorineural causes; that the G.I. series showed no organic disease demonstrated in the upper gastrointestinal system; that X-ray studies of the knees and chest showed no unusual findings; that hematology and urinalysis examinations were within normal limits; and that orthopedic examination showed posture and gait normal with no swelling or deformity of joints and no limitation of motion of extremities. There was noted, however, some crepitus on flexion and extension of both knees with slight discomfort. The special neurological examination revealed no evidence of cerebrovascular accident or of an alleged "stroke."

33. By VA rating action of May 5, 1971, plaintiff's claim for service-connection for claimed stroke was denied because it was not shown by the evidence of record, and service-connection for bone cyst was denied because it was not shown on last examination. In addition, the 1968 evaluation of 10 percent for the previously service-connected duodenal ulcer was reduced to a noncompensable rating because the G.I. series revealed no evidence of the ulcer or other pathology. By this rating action decision, plaintiff was rated 10 percent from January 7, 1971, for "arthritis, knees."

34. By VA rating action dated March 22, 1972, the prior rating action of May 5, 1971 was corrected to show the arthritic condition to consist of "hypertrophic arthritis with exostosis base first metatarsal bone, bilateral." The evaluation rating of 10 percent was retained.

35. By letter dated November 30, 1972, the VA sent the ABCMR a summary of plaintiff's claims and VA rating actions thereon, and enclosed the VA clinical, medical, and physical examination records. The VA further advised that a claim for service connection for a heart condition was received on August 30, 1972, "and is pending receipt of medical records from the United States Air Force Hospital, MacDill Air Force Base, Tampa, Florida."

36. By VA Rating Decision dated January 5, 1973, service-connection for a claimed heart condition was denied on the grounds that such heart condition was not shown by the evidence of record. Plaintiff was

again rated at only 10 percent, *i.e.*, for hypertrophic arthritis with exostosis base first metatarsal bone, bilateral. This rating decision did contain thereon the following statement:

> Report from Internal Medical Clinic, MacDill Air Force Base, shows history of questionable angina and chest pain radiating to left arm. Later report dated 11-21-72, shows no significant change of EKG since tracing of 9-5-72. Within normal limits. Impression was hyperventilation syndrome and musculoskeletal chest wall pain, no current evidence for arteriosclerotic heart disease nor heart attack. No diagnosis of organic heart lesion made.

37. The Surgeon General, in response to a request from the ABCMR to furnish an opinion for the guidance of the Board concerning plaintiff's contention that he should have been retired by reason of physical disability in lieu of being relieved from active duty and reverting to his retired status, advised the ABCMR, under date of January 29, 1973, as follows:

> 1. Applicant seeks medical disability retirement in lieu of retirement length of service. In support of claim submits documentation showing a disability rating of 10% for Duodenal Ulcer 1968, 0% for duodenal ulcer 1971, and 10% for arthritis of the knees. A post retirement physical examination was performed 2 May 1972 at USAF, MacDill AFB.

> 2. This examination and the VA examination indicates that SGT Osborne is fit for retention and retirement.

38. Pursuant to a request of plaintiff's counsel to examine plaintiff's military records, plaintiff's then counsel from the Disabled American Veterans reviewed the records and advised the ABCMR on February 6, 1973 that "[t]his case is submitted on the evidence of record." Plaintiff testified, however, that he did not authorize his counsel to waive a hearing before the Board.

39. An examiner for the ABCMR, under date of February 8, 1973, submitted to the Board the following report:

> NAME: OSBORNE, JESSE H.
> SSAN: 232-32-0242
> RANK: 1SG
> REVERTED TO RETIRED STATUS: 7 January 1971
>
> *APPLICANT REQUESTS:* In effect, correction of his military records to show he was retired by reason of physical disability in lieu of RAD and reversion to retired status on 7 Jan 71.
>
> *APPLICANT STATES:* He was not given a retirement physical at the time of his separation on 7 Jan 71. He feels that he should have been retired due to disability. He was told to have a physical examination which is attached to his application.

MATERIAL EVIDENCE OF RECORD: Incorporated in this Memorandum, and included by this reference, are the military and medical records which show, in pertinent part:

DOB:	11 Apr 30
Retired (over 20 yrs svc):	1 Mar 68
Total active svc:	20 yrs, 1 mo, 29 days
Recalled to AD:	1 Mar 70
Reverted to retired status:	7 Jan 71

On 3 Apr 69 appl submitted a request for recall from retired status.

Report of medical examination, dated 3 Apr 69, indicates appl was considered to be qualified for recall to AD with physical profile 3 1 1 2 2 1.

On 6 Feb 70 orders were issued recalling appl to AD with assignment to Hq & Hq Co, Field Forces Vietnam.

On 26 Oct 70 appl requested RAD and return to a retired status. On 5 Nov 70, Hq 4th Inf Div, Vietnam, recommended approval of appl's request in view of the fact that he appeared to have been medically ineligible for enlisted personnel recall program under provisions of Par. 3 a and e, AR 601-250.

On 6 Jan 71 orders were issued directing appl's RAD and reversion to retired status effective 6 and 7 Jan 71, respectively.

On 9 Feb 72, US Army Reserve Components Personnel and Administration Center informed a member of the Congress that, although appl was entitled to a final type physical examination, there is no record to show that one was accomplished. Since he was in a retired status, he was eligible to go to any military facility for a final type physical examination. The nearest military facility was MacDill AF Base, Tampa, Fla, and it was suggested that appl contact that installation and request that he be given a final type physical examination.

On 2 May 72, appl was physically examined at MacDill AF Base Regional Hospital. Review of this examination by SGO indicates appl was physically fit for retention and retirement.

On 30 Nov 72, VA informed the Board that, based on medical records and VA examination of 27 Apr 71, appl was rated on 5 May 71 as follows:

Arthritis, knees, code 5003	- 10% fr 7 Jan 71
Duodenal ulcer, history of, code 7305	- -0%
Defective hearing, code 6297	- -0%
Prostatic hypertrophy, code 7527	- -0%
Fungus infection, code 7813	- -0%

On 29 Jan 73, SGO states that post-retirement physical examination of 2 May 72 and VA examination indicates appl was fit for retention or retirement. (Copy SGO Cmt 2, 29 Jan 73, attached).

DISCUSSION: Medical evidence of record in this case indicates that, at time of appl's RAD and reversion to retired status on 7 Jan 71, he did not have a physical or mental impairment of such severity as to render him physically unfit for the performance of duty and warrant his retirement by reason of physical disability.

Counsel submits this case for consideration on evidence of record.

RECOMMENDATION: In view of the foregoing, it is considered that there is insufficient evidence of error or injustice in this case to warrant a recommendation for a formal hearing.

40. On October 29, 1973, a national service officer of the VA, St. Petersburg, Florida Regional Office, submitted to the VA Adjudication Division statements of Lee J. Cordrey, M.D., an orthopedic specialist and surgeon who had examined plaintiff on June 28, 1973, with the request that the statements be considered as an informal claim for increase in plaintiff's disability evaluation and/or as an amended claim for service-connection for degenerative arthritis. Dr. Cordrey's statements contained therein the diagnosis that plaintiff suffered diffuse degenerative arthritis.

41. On the basis of a special orthopedic examination conducted by the VA on January 16, 1974, a VA Board of Rating Specialists made a determination on February 21, 1974 that the "current VA examination does not show increase in severity of the veteran's service connected hypertrophic arthritis with exostosis base first metatarsal bone bilateral." Plaintiff was so advised on February 26, 1974, as well as being advised as to the arthritis again being rated at 10 percent disabling.

42. In an examination of plaintiff made by Lee J. Cordrey, M.D., on September 15, 1975, it was the qualified opinion of Dr. Cordrey that plaintiff had "probable rheumatoid arthritis."

43. As of the date of his examination of plaintiff on September 15, 1975, it was Dr. Cordrey's opinion that plaintiff "was suffering 30 percent permanent partial disability of the body as a whole as the result of the probably [sic] rheumatoid arthritis superimposed upon a definite degenerative arthritis." Dr. Cordrey further testified that he hadn't formed an opinion as to the percentage in 1973, but that plaintiff "had suffered a 20 percent increase in the degree of his objective findings between 1973 and 1975."

44. Under date of February 24, 1976, a VA adjudication officer advised the plaintiff as follows:

> Your claim for increased compensation has been carefully considered based on all the evidence of record.

Your service connected arthritis of both feet has been increased from 10 percent to 20 percent effective October 29, 1973. The monthly rate of compensation payable is $51 effective October 29, 1973; $59 effective May 1, 1974; and $65 effective August 1, 1975.

We have requested the Service Department to adjust your retired pay. When the evidence is received that this adjustment has been made, action will be taken to pay you the increased compensation.

In view of the favorable decision on your claim which has allowed all benefits sought, your Notice of Disagreement has been withdrawn.

45. AR 15-185, August 28, 1970, Army Board for Correction of Military Records, provided, in part, as follows:

Section III. APPLICATION FOR CORRECTION

* * * *

10. Consideration of application. a. Each application and the available military or naval records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing. * * *

b. The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. * * *

c. When an application is denied without a hearing, written findings, conclusions, and recommendations are not required.

* * * *

Section VIII. MISCELLANEOUS

27. Staff assistance. * * *

b. The Board is authorized to call upon the Office of the Secretary of the Army and the Department of the Army General and Special Staffs for investigative and advisory services and upon any other Department of the Army agency for assistance, within the specialized jurisdiction of that agency.

46. AR 601-250, 18 February 1969, Personnel Procurement, Retired Enlisted Personnel Recall Program, provided, in part, as follows:

1. Purpose. This regulation establishes policy and prescribes procedures for application and recall to active duty and subsequent relief from active duty of nondisabled retired enlisted personnel.

* * * *

3. Eligibility requirements. Retired enlisted personnel may apply for recall to active duty

for a period of 3 years, provided they meet the following criteria:

a. Are not eligible for or receiving disability retirement pay.

b. Were retired in pay grade E-5 or above.

c. Have not reached their 50th birthday on the date established for recall to active duty.

d. Have completed less than 27 years of active Federal service.

e. Meet retention medical fitness standards prescribed by chapter 3, AR 40-501.

f. Be qualified for an MOS and grade authorized in the List of MOS Authorized for Recall (para 7).

* * * *

10. Relief from active duty.

* * * *

d. * * * (1) Final-type physical examination will be accomplished in accordance with the provisions of AR 40-501.

CONCLUSION OF LAW

This court does not have jurisdiction of the claim for which plaintiff seeks relief. Plaintiff is not entitled to any recovery against the United States for the further

reason that he has failed to establish that the Army Board for Correction of Military Records did not act arbitrarily, capriciously or contrary to law or regulation in refusing to change his records to reflect retirement by the Army for physical disability rather than for length of service.

Plaintiff's petition is dismissed.

APPENDIX B

ORDER

(Number and Title Omitted)

Filed: APR. 21, 1978

David L. Woodward, attorney of record, and *Britt Whitaker*, for plaintiff.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant.

Before DAVIS, *Judge*, Presiding, COWEN, *Senior Judge*, and KUNZIG, *Judge*.

These cases come before the court on plaintiff's exceptions to the recommended decision of Trial Judge Francis C. Browne, filed April 29, 1977, pursuant to Rule 134(h), and on defendant's request that the court adopt the trial judge's findings of fact, opinion and

recommended conclusion of law with modifications as set forth in its brief filed December 13, 1977. The cases have been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, consisting of his findings of fact, opinion and recommended conclusion of law, with modifications, it hereby affirms and adopts the same as the basis for its judgment in this case with the following modifications:

1. The paragraph beginning with the words "He invokes" and ending with the words "be dismissed" appearing on the last three lines of page 3 and the first four lines of page 4, together with the entire footnote numbered 2 on pages 3 and 4 are deleted.

2. The last sentence (beginning with the word "As" and ending with the word "controversy") of footnote 5 of page 10 is deleted.

3. Footnote 7 (beginning with the words "other citations" and ending with the word "records") appearing on page 15 is deleted.

4. The first two sentences (beginning with the word "Third" and ending with the word "weight") in the paragraph appearing in the middle of page 18 are deleted.

5. The last paragraph appearing on page 19 (beginning with the word "Thus" and ending with the word "relief") is deleted.

6. The first sentence of the recommended Conclusion of Law (starting with the word "This" and ending with the word "relief") appearing on page 34 is deleted.

7. The word "further" appearing in the third line of the trial judge's recommended Conclusion of Law is deleted.

IT IS THEREFORE CONCLUDED AND ORDERED that plaintiff is not entitled to recover and the petitions are dismissed.

BY THE COURT
/s/ OSCAR H. DAVIS
Oscar H. Davis
Judge, Presiding

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-88

JESSE H. OSBORNE,
Petitioner,

versus

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 18, 1978.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 25th
day of July, 1978.

Supreme Court, U. S.
FILED
DEC 12 1978
MICHAEL RODAK, JR., CLERK

No. 78-462

In the Supreme Court of the United States

OCTOBER TERM, 1978

JESSE H. OSBORNE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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No. 78-462

JESSE H. OSBORNE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims' trial judge (Pet. App. 1a-35a) is not reported. The order of the Court of Claims modifying and adopting that opinion (Pet. App. 35a-37a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 21, 1978. On July 25, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 18, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Army Board for Correction of Military Records improperly denied petitioner disability retirement pay.

STATEMENT

After serving 20 years in the United States Army, petitioner retired in March 1968. Several months before his discharge, he was given a full physical examination. The examination revealed a number of ailments, none of which was found serious enough to render petitioner unfit for military service (Pet. App. 4a, 19a).[1] Nine days before his discharge, petitioner applied to the Veterans Administration for disability benefits. A month later, after petitioner's retirement, the VA gave him a 10% service-connected disability rating on the basis of his ulcer. Petitioner's renewed claim for disability benefits prompted a VA physical examination in May 1968. The examination resulted in an additional 10% disability rating based on a finding that petitioner suffered from arthritis (*id.* at 20a-21a).[2]

In April 1969 petitioner applied to the Army for recall from retired status (Pet. App. 21a). He was given a physical examination and found qualified for recall. Petitioner returned to active duty in March 1970 and was assigned to duty in Vietnam. During his service there, petitioner complained of and received treatment for a variety of physical ailments (*id.* at 5a, 22a-23a). In

[1]The examination revealed that petitioner suffered from a duodenal ulcer, astigmatism, benign hypertrophy of the prostate gland, and athlete's foot.

[2]As the trial judge in the Court of Claims observed, the 20% disability found by the VA did not entitle petitioner to total benefits higher than his regular retirement pay. Although the 20% disability rating made petitioner eligible for veteran's disability benefits under either 38 U.S.C. 310 or 38 U.S.C. 331, applicable law provides that in order to receive such benefits, a person must agree to a reduction in his retirement pay in an equal amount. See 38 U.S.C. 3104(a), 3105; 38 C.F.R. 3.750. Thus, petitioner's objective in this litigation has not been to establish his entitlement to veteran's disability benefits but rather to show that his disability is of the kind that would entitle him to a higher rate of retirement pay. See note 3, *infra*.

September 1970 an Army medical board recommended a permanent limitation of petitioner's assignments to positions not involving field duty or prolonged standing or marching (*id.* at 23a). In October 1970 petitioner requested release from active duty and return to retired status. The request was approved in December 1970, and petitioner returned to retired status the following month. He did not receive a full physical examination before his release in January 1971 (*ibid.*).

Petitioner was again examined by the VA in April 1971. That examination produced no evidence of an ulcer and, accordingly, petitioner's VA disability rating was reduced to 10%, based on his continuing arthritis (Pet. App. 6a-7a, 24a-25a). In May 1972, after seeking the assistance of his Congressman, petitioner received a full military physical examination. The examination did not demonstrate that petitioner should have been retired for physical disability (*id.* at 6a, 23a-24a, 29a).

In September 1972 petitioner turned to the Army Board for the Correction of Military Records. He applied for a change in his records to indicate that he had been retired because of a disability of not less than 30% rather than because of his length of service (Pet. App. 3a, 7a, 24a).[3] In

[3]Petitioner apparently did not question that his original retirement in 1968 was a voluntary retirement based on length of service. See 10 U.S.C. 3914. Rather he sought to establish that, while on active duty after his retirement, he incurred "a physical disability of at least 30 percent for which he would otherwise be eligible for retired pay under [10 U.S.C. 1201]." Such a showing is necessary in order to bring petitioner within the coverage of 10 U.S.C. 1402(b). Coverage under Section 1402(b) permits a person initially retired under Section 3914 to compute his retirement benefits under 10 U.S.C. 1402(d) rather than under 10 U.S.C. 3991.

When a person has served more than 20 years in the armed forces, eligibility for retired pay under 10 U.S.C. 1201 does not require a showing of a disability of at least 30%. The person must show only that he has a permanent disability that renders him "unfit to perform

response to petitioner's application, the ABCMR requested and received from the VA all records pertaining to petitioner, including the records and reports of his Army and VA physical examinations (*id.* at 7a, 25a). The ABCMR also requested and received an advisory opinion from the Surgeon General. The opinion concluded that petitioner "is fit for retention and retirement" (*id.* at 7a, 27a).

Petitioner was represented before the ABCMR by counsel from the Disabled American Veterans. At counsel's request, he was permitted to examine all records concerning petitioner's military service and physical condition. After this review, counsel informed the ABCMR that the case would be "submitted on the evidence of record" (Pet. App. 7a, 27a, 30a).[4]

The ABCMR then received the written report of one of its own examiners, who reviewed petitioner's application and the records of his medical condition (Pet. App. 7a-8a, 27a-30a). The examiner concluded that petitioner "did not have a physical or mental impairment of such severity as to render him physically unfit for the performance of duty and warrant his retirement by reason of physical disability" (*id.* at 30a). The examiner also stated that

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the duties of his office, grade, rank, or rating * * *." Section 1402(b) imposes the additional 30% disability requirement for persons who have already been retired for reasons other than physical disability and then return to active duty and incur a disability that would justify their retirement under Section 1201.

Petitioner's insistence on establishing his coverage under Section 1402(b) is difficult to explain, because, as the trial judge in the Court of Claims observed (Pet. App. 3a n.2), it is not clear on the face of the statutes that petitioner's retired pay computed under 10 U.S.C. 1402(d) would be higher than that computed under 10 U.S.C. 3991.

[4]Petitioner's application for correction of records requested an opportunity for a personal appearance before the ABCMR (Pet. App. 7a).

"there is insufficient evidence of error or injustice in this case to warrant a recommendation for a formal hearing" (*ibid.*). In light of the examiner's comments and the announced willingness of petitioner's counsel to submit the case on the record, the ABCMR reviewed the written materials before it and in February 1973 denied petitioner's application for correction of records (*id.* at 8a, 24a).[5] The Adjutant General informed petitioner of the denial and stated (*id.* at 8a): "In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the board is not contemplated."

Petitioner then filed this suit in the Court of Claims challenging the decision of the ABCMR. A trial was conducted, and the court adopted the opinion of its trial judge in all relevant respects.[6] The court held that decisions of the ABCMR should not be disturbed, unless a plaintiff shows by clear and convincing evidence that a decision is "arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to applicable law and regulations" (Pet. App. 10a). The court found that in this

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[5]In January 1973 the VA denied petitioner's request for a disability rating based on an alleged heart condition (Pet. App. 25a). The VA again determined that petitioner was entitled only to a 10% disability rating based on his arthritis (*id.* at 25a-26a). That determination was reaffirmed after petitioner underwent a special VA orthopedic examination in January 1974. In February 1976, after petitioner submitted the report of one or more examinations by a private orthopedic specialist, the VA increased his arthritis disability rating to 20%, effective retroactively to October 29, 1973 (*id.* at 7a, 30a-32a).

[6]The trial judge ruled sua sponte that the Court of Claims lacked jurisdiction under 28 U.S.C. 1491, because petitioner did not establish to a certainty that, if his alleged coverage under a different retirement provision were sustained, it would result in a higher rate of retired pay (Pet. App. 3a & n.2). Petitioner and the government agreed that this ruling was incorrect, and the Court of Claims indicated its rejection of the ruling by modifying the trial judge's opinion to omit all references to the jurisdictional point (*id.* at 36a-37a).

case petitioner fell far short of carrying his burden and in fact "presented no evidence showing he was unfit for retention or recall to military service at the time of either retirement" (*id.* at 11a). The court discerned no procedural defect in the ABCMR's handling of petitioner's request for correction of records. The court observed first that petitioner's counsel had waived an oral hearing, and second that the ABCMR is not obligated to provide an opportunity for oral argument when a person seeking correction of records fails to present some evidence of error or injustice (*id.* at 14a-16a). The court noted that, when asked at trial what he would have said if he had appeared before the ABCMR, petitioner responded that he would have stressed the Army's failure to give him a full physical examination immediately before his second separation from the service in January 1971 (*id.* at 15a). The court concluded that such a statement could not have affected the ABCMR's decision, because petitioner contended that his physical condition worsened after retirement and even the full examination conducted in May 1972 produced no evidence that petitioner should have been retired for disability (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 7-12) that the ABCMR acted arbitrarily in denying his request for correction of records. The record provides no support for this contention. All the evidence before the ABCMR indicated that petitioner did not have a disability rendering him unfit for military service. Repeated physical examinations showed that petitioner was capable of further service in the Army and was fit for retirement. As the Court of Claims found, petitioner did not present any evidence, and certainly not "clear and convincing" evidence, that the ABCMR decision was arbitrary or capricious.

Petitioner's reliance on the testimony of a psychologist, private physicians, and his fellow workers is misplaced. This evidence was adduced at trial in the Court of Claims

but not before the ABCMR. The court correctly concluded that the trial testimony cast no doubt on the ABCMR decision, and that petitioner "is not now physically disabled to any substantial degree" (Pet. App. 11a). Even if the trial testimony established a disability, however, petitioner's remedy would be a new application for correction of records, not an attack on the denial of his 1972 application.

2. Petitioner argues (Pet. 12-17) that he is entitled to relief because he was not given a full physical examination before his return to retired status in January 1971. Even if the failure to conduct such an examination violated Army regulations, petitioner was not harmed. He received a full physical examination in May 1972, well before the ABCMR decision in February 1973. The examination indicated that petitioner was fit for retention or retirement. Petitioner does not suggest any way in which the timing of the examination affected the ABCMR decision.

3. Finally, petitioner complains (Pet. 17-22) that the ABCMR's failure to grant an oral hearing denied him due process. But petitioner's counsel waived an oral hearing and stated that the case should be submitted on the record (Pet. App. 27a). Furthermore, petitioner has not identified any additional evidence that he would have presented had a hearing been held. The ABCMR properly determined that petitioner did not "demonstrate the existence of probable material error or injustice." Under these circumstances, Army regulations permit the denial of an application for correction of records without a hearing. See 32 C.F.R. 581.3(c)(5)(ii). These regulations pose no constitutional problem, at least where the critical issue is one amenable to reliable resolution through written submissions. This Court has indicated that the existence and extent of medical disability are such issues. See *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). And, of

course, if petitioner believes that he has now accumulated new evidence of a disability incurred while he was on active duty in 1970, he is free to file a new application for correction of records with the ABCMR.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12